Supreme Court of the United States.

OCTOBER TERM, 1904.

EMPIRE STATE-IDAHO MINING & DEVELOPING COMPANY, and THE AMERICAN BONDING COMPANY, OF BALTIMORE,
APPELLANTS,

vs.

KENNEDY J. HANLEY,
APPELLEE.

No.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

MOTION OF APPELLEE TO DISMISS THE APPEAL, AND BRIEF IN SUPPORT THEREOF.

MOTION TO DISMISS.

Comes now Kennedy J. Hanley, Appellee herein, and moves this Honorable Court to dismiss the appeal herein because the jurisdiction of the United States

Circuit Court for the District of Idaho in this case depended entirely upon diversity of citizenship, and the decree of the United States Circuit Court of Appeals for the Ninth Circuit, from which this appeal was taken, is, therefore, final within the meaning of Section 6 of the Act of March 3, 1891.

And the motion is made upon the further ground that if a federal question did appear upon the face of the complaint, appellants do not bear such a relation to the question as would entitle them to appeal to this Court because of that fact.

M. A. Folsom
Attorney for Appellee.

To the Appellants, and to their counsel, George Turner and F. T. Post:

You are hereby notified that the Appellee, Kennedy J. Hanley, will on May 1st, 1905, on the meeting of the United States Supreme Court on that day, or as soon thereafter as counsel can be heard, submit for the consideration of the Court the foregoing motion, and the brief in support thereof hereto attached.

M. A. Folsom
Counsel for Appellee.

Service admitted March 30, 1905.

George Turner
Counsel for Appellants.

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THE RECORD.

The record in this case in the Court of Appeals comprised seven printed volumes. This appeal having been taken in due form from a decree of the Circuit Court of Appeals for the Ninth Circuit, the right to review it depends upon the allegations of the complaint. (Colorado Cent. Co. v. Turck, 150 U. S. 138.)

Therefore, for the purposes of this motion we would be required to print only the complaint. But in addition to that other parts of the record which may be of service in understanding the case will be printed.

BRIEF OF APPELLEE.

FACTS.

On March 19, 1899, appellee, Kennedy J. Hanley, brought this suit in equity in the United States Circuit Court for the District of Idaho, against Charles Sweeny, F. Lewis Clark, and the Empire State-Idaho Mining & Developing Company. The suit involved Hanley's claim to the ownership of an undivided one-eighth interest, and of an undivided one-third interest in the Skookum mining claim, situated in Shoshone County, Idaho.

The claim of Hanley in respect to the two interests rested upon distinct and independent grounds. The one-third interest was owned by David McKelvey during his lifetime. After the latter's death certain proceedings were had in the Probate Court which, it was claimed, amounted to a sale of that interest by the administrator of the estate to Hanley, but the administrator had subsequently conveyed this interest to the

Chemung Mining Company by deed, and the latter company had conveyed the same to the Empire State-Idaho Mining & Developing Company. Hanley, by this suit, asked a decree declaring his title to the one-third interest to be good against the claim of the said Empire State Company.

Hanley's title to the one-eighth interest was derived through mesne conveyances from the original grantee under a patent from the United States. This interest had been conveyed by Hanley to Sweeny and Clark by deed dated April 30, 1898, and deposited on that date in the Exchange National Bank of Spokane, Washington, to be delivered to Sweeny and Clark upon certain stipulated conditions. Hanley claimed that Sweeny and Clark had obtained possession of this deed wrongfully and contrary to the terms of the escrow agreement, and had afterward made a pretended deed of this interest to the Empire State Company. Hanley prayed that his deed of April 30, 1898, be declared null and void, and that his title to this interest be declared good and valid. The complainant also prayed for a receiver of the property, and that defendants be compelled to account for Hanley's share of the proceeds of the mine taken after the making of the escrow deed.

Issue was joined and testimony taken before an examiner and reported to the Court. After argument the Circuit Court held that Hanley never became the owner of the one-third interest because there was no return under oath by the administrator to the Probate Court of the sale to Hanley, as required by the statute of Idaho (which had been construed by the Supreme Court of that state), and therefore no title had passed. As

to the one-eighth interest, the Circuit Court held that Hanley had not proved his case to the satisfaction of the Court. A decree was therefore entered against Hanley as to both interests.

Hanley appealed to the Circuit Court of Appeals for the Ninth Circuit, and on May 6, 1901, that Court held that Hanley was not entitled to relief as to the one-third interest, because of his conduct in the Probate Court. As to the one-eighth interest, the Court of Appeals held that Hanley had been induced through gross fraud of Clark and Sweeny to execute and deposit in escrow the deed, and that the same had never been delivered, but that Clark and Sweeny had gotten possession of the same without paying the consideration therefor, and in fraud of Hanley's rights, and the said deed was therefore held to be void. (See 109 Fed. 712; 126 Fed. 97.) The Court of Appeals reversed the decree as to the one-eighth interest and ordered further proceedings. In November, 1901, a petition by the defendants for a rehearing was denied, and thereupon they filed a petition for certiorari in this Court, which petition was denied on January 13, 1902. (183 U. S. 700.)

Upon the filing of the mandate an order was made referring the case to a master to take an accounting as to the one-eighth interest. Subsequently, in March, 1902, the District Judge suspended this order and refused to allow the master to proceed. Upon an application for a writ of mandamus, the Court of Appeals, on May 12, 1902, held that Hanley was entitled to have the master proceed with the accounting. (117 Fed. 59.) The master thereafter reported that Hanley was

entitled to recover from the Empire State Company $265,241.83, with interest. The Circuit Court, upon the coming in of the master's report, reduced the amount to $175,867.02, because the master had failed to allow the defendants the cost of working the property while they fraudulently excluded Hanley from entering the mine or sharing in the proceeds. The Court entered a decree (November, 1902) quieting Hanley's title to the one-eighth interest, and gave him judgment against the Empire State Company for the last named amount.

The defendants appealed from this decree and Hanley filed a cross-appeal. The defendants filed a supersedeas bond with the American Bonding Company, of Baltimore, as surety. The Court of Appeals awarded the defendants nothing by their appeal, but held on the cross-appeal (November 9, 1903) (126 Fed. 97) that the Circuit Court erred in allowing the defendants their working costs while they fraudulently excluded Hanley from the mine and appropriated his share of the proceeds to themselves. The Court of Appeals remanded the case with directions to ascertain the date when the fraudulent exclusion ceased, and to modify the judgment accordingly. The defendant company filed a petition for rehearing, which was denied, and thereafter filed another petition for certiorari in this Court. That petition was denied on March 7, 1904. (193 U. S. 671.)

The Circuit Court, after taking evidence as to the date when the fraudulent exclusion ceased, fixed the date and modified the decree as directed by the Court of Appeals, and entered a decree against the American

Bonding Company for the amount for which that company was liable as surety on the supersedeas bond. Another appeal was taken by the two companies to the Court of Appeals, and on February 6, 1905, that Court affirmed the decree as modified. (See Record.) An appeal was prayed to this Court from the last decision, was considered by the Court of Appeals, but was denied on the ground that the case was not one which could be carried to the Supreme Court by appeal.

Thereafter one of the Justices of this Court allowed an appeal.

We respectfully move the Court to dismiss the appeal upon the ground that the decree of the Court of Appeals is final, and no review of the same can now be had in this Court by appeal.

OUR CONTENTIONS.

We contend that this appeal should be dismissed because:

1. The jurisdiction of the Circuit Court depended entirely upon diversity of citizenship.
2. No federal question was passed upon by either the Circuit Court or the Court of Appeals. Both Courts assumed that the jurisdiction depended entirely upon diversity of citizenship.
3. The appellants and appellee have heretofore always maintained that the jurisdiction rested entirely upon diversity of citizenship.
4. The claim to the one-third interest, concerning which the appellants now assert that a constitutional question was raised by Hanley, was abandoned by him in May, 1901, and that interest is no longer involved in this litigation.

5. If sufficient allegations of a constitutional question with reference to the one-third interest were made in the complaint, appellants do not bear such a relation to the question as would entitle them to appeal to this Court.
6. This appeal was taken merely for delay.

I.

JURISDICTION OF THE CIRCUIT COURT DEPENDED ENTIRELY UPON DIVERSITY OF CITIZENSHIP.

The complaint clearly showed that the Circuit Court had jurisdiction in this case by reason of diversity of citizenship, plaintiff being a citizen and resident of Idaho, two of the defendants being citizens and residents of Washington, and the corporation defendant being organized under the laws of the State of New York.

"If the jurisdiction of the Circuit Court was depend-
"ent entirely upon diversity of citizenship the decree of
"the Circuit Court of Appeals is final, and this appeal
"cannot be maintained."

Stevenson v. Fain, 195 U. S. 165.

Appellants claim that jurisdiction also depended upon the fact that a constitutional question was involved. Is this true?

The complaint contained two causes of action, one relating to a one-third interest in the Skookum mine and one relating to a one-eighth interest therein.

"*The claims of the complainant with respect to the*
"*two interests were based upon distinct and independent*
"*grounds.*" (109 Fed. p. 713.)

The claim as to the eighth interest was that Hanley, as owner thereof, had been fraudulently induced by his co-tenants, Clark and Sweeny, to execute and deposit in escrow a deed to them of that interest in the Skookum mine; that they had concealed from him the fact that a large body of ore had been uncovered by them in the property in a tunnel which they had run through other property, and had represented to him that the property was valueless. It was further claimed that after inducing him to place this deed in escrow they fraudulently got possession of the same without delivery and without paying any consideration therefor, and conveyed it to the Empire State Company. These contentions of Hanley as to this interest were sustained by the Circuit Court of Appeals for the Ninth Circuit, and it is this one-eighth interest (with the fruits thereof) which is now the sole subject of litigation.

Hanley's claim as to the one-third interest was based upon the contention that he had purchased it from the administrator of the estate of David McKelvey, and that the Probate Court of Shoshone County, Idaho, had confirmed the sale to him; that a corporation in which Clark and Sweeny and he were interested, called the Chemung Mining Company, also made a bid to the administrator for the interest, and that after the Probate Court had entered a decree confirming the sale to Hanley, and after a deed had been executed to him, that court, without notice to him and without taking any proof, made another order or decree setting aside the previous decree in Hanley's favor on account of misrepresentation and fraud, and confirmed a sale of said interest to the Chemung Mining Company and di-

rected the administrator to execute a conveyance thereof to said company. That thereafter the District Court of the State of Idaho, upon an *ex parte* showing, ordered the administrator of said estate to execute a deed in pursuance of the decree of the Probate Court, and upon appeal the judgment of the District Court awarding the mandamus was affirmed. That thereafter the Chemung Mining Company transferred the interest to the Empire State-Idaho Mining & Developing Company.

Hanley claimed that the proceedings of the Probate Court were without jurisdiction of either the subject matter or the parties; that the proceedings were taken after the close of the term of that court and without notice to him, and that the same were therefore null and void and not binding upon him, but that said proceedings and the deed executed in pursuance thereof cast a cloud upon his title, and he therefore asked that the defendants should be adjudged to have no right or title to this third interest.

At the hearing of this case the United States Circuit Court found that the sale by the administrator to Hanley was void because the administrator had not made a return of his sale under oath to the Probate Court, as required by the statute of Idaho. The Circuit Court of Appeals refused to inquire into Hanley's complaint as to the third interest because it found that at the time of the confirmation by the Probate Court of the sale to him he and others concealed from the representative of the Chemung Mining Company, who was also a bidder, the fact that he had raised his bid. It was held, therefore, by the Court of Appeals that his conduct was

such as to deprive him of the assistance of a court of equity to quiet his title to the one-third interest.

The appellants here claim that the allegations made by Hanley in his complaint as to the third interest (which was decided against him) amounted to a claim by him that he had been deprived of this interest by the Probate Court without due process of law, and that, therefore, his allegations were sufficient to support the jurisdiction of the Circuit Court upon the ground of the federal questions involved, independent of the diversity of citizenship of the parties.

Is this the proper construction of the complaint? We respectfully contend that it is not.

This Court has repeatedly held that the allegations of a federal question must appear in the complaint, and must be clear and distinct and must show a substantial federal question. All doubts are to be resolved against the jurisdiction of the Circuit Court.

Grace v. American Cent. Ins. Co., 109 U. S. 278.

Lampasas v. Bell, 180 U. S. 276.

"When a suit does not really and substantially involve "a dispute or controversy as to the effect or construction "of the Constitution or laws of the United States, upon "the determination of which the result depends, it is "not a suit arising under the Constitution or laws."

Western Union Tel. Co. v. Ann Arbor R. Co., 178 U. S. 239.

"The judicial power extends to all cases in law and "equity arising under the Constitution, but these are "cases actually and not potentially arising, and jurisdic-

"tion cannot be assumed on mere hypothesis. In this "class of cases it is necessary to the exercise of original "jurisdiction by the Circuit Court that the cause of ac- "tion should depend upon the construction and applica- "tion of the Constitution, and it is readily seen that "cases in that predicament must be rare."

New Orleans v. Benjamin, 153 U. S. 423.

The allegations of the complaint in this case amount simply to a statement by Hanley that his title to the third interest was good because he had purchased it from the administrator under a Probate Court decree, and that the subsequent decree of the Probate Court, which annulled the decree in his favor and awarded the property to another, was void because the Court ceased to have jurisdiction to change its former decree after term time, without notice. This was a question of local law. It was an allegation merely of lack of jurisdiction, and not of lack of due process. It depended in the first instance on the law of the State of Idaho regulating probate courts.

In York v. Texas, 137 U. S. 15, this Court said:

"The proposition is that the denial of a right to be "heard before judgment simply as to the sufficiency of "the service operates to deprive the defendant of lib- "erty or property. But the mere entry of the judgment "for money, which is void for want of proper service, "touches neither. It is only when process is issued "thereon, or the judgment is sought to be enforced, that "liberty and property is in present danger. If at the "time of immediate attack protection is afforded, the "substantial guarantee of the Amendment is preserved, "and there is no just cause of complaint. . . . It "certainly is more convenient that a defendant be per-

"mitted to object to the service, and raise the question "of jurisdiction, in the first instance, in the court in "which suit is pending. But mere convenience is "not substance of right. If the defendant had taken "no notice of this suit, and judgment had been formally "entered upon such insufficient service, and under pro- "cess thereon his property, real or personal, had been "seized or threatened with seizure, he could by original "action have enjoined the process and protected the pos- "session of his property. If the judgment had been "pleaded as defensive to any action brought by him, "he would have been free to deny its validity. There "is nothing in the opinion of the Supreme Court or in "any of the statutes of the state, of which we have been "advised, gainsaying this right."

There was no pretense on Hanley's part that the District Court of the State of Idaho or the Supreme Court would hold the proceedings in the Probate Court, if attacked by him directly, to be of any effect as against his purchase. He alleged merely that the District Court and the Supreme Court held that as between the Chemung Company and the administrator it was the duty of the latter to obey the decree of the Probate Court, but there was no pretense that such obedience deprived Hanley of his rights or property. On the contrary, *he contended in this suit that the proceedings were void for lack of jurisdiction, and had no binding effect upon him. He did not mention the Constitution or laws of the United States* in his complaint. If Hanley had alleged that the Supreme Court of Idaho had held that the effect of the second decree of the Probate Court was to deprive him of his property, and to award it to the Chemung Company, it may be that such allegations would have amounted to a claim of lack of due pro-

cess of law. But no such allegations are found in the complaint. There is no pretense that he could not have secured redress by direct suit in the state courts of Idaho attacking the decree as being void for lack of jurisdiction.

Unless Hanley first established the regularity of the sale to him, he would not be in a position to attack the regularity of the sale to the Chemung Company. He could not claim to have been deprived of the interest until he should have established that he had acquired it. The constitutional question, if any was raised, was therefore conjectural.

Cosmopolitan Co. v. Walsh, 193 U. S. 460.

In Cornell v. Green, 163 U. S. 75, this Court said:

"The Constitution of the United States is not men-
"tioned in the bill of Cornell or in the demurrer of the
"defendant, or in the decree or opinion of the Court.
"The case appears to have been treated throughout as
"depending upon a question of chancery practice, not
"of constitutional right."

In Ansbro v. U. S., 159 U. S. 695, 697, this Court said:

"A case may be said to involve the construction or
"application of the Constitution of the United States
"when a title, right, privilege or immunity is claimed
"under that instrument; but a definite issue in respect
"of the possession of the right must be distinctly dedu-
"cible from the record before the judgment of the court
"below can be revised on the ground of error in the dis-
"posal of such a claim by its decision."

In *Ex Parte* Lennon, 150 U. S. 393, 400, this Court said:

"Nor can the attempt be successfully made to bring

"the case within the classes of action in which the con-
"struction or application of the Constitution is involved
"in the sense of the statute on the contention that the
"petitioner was deprived of his liberty without due pro-
"cess of law. The petition does not proceed on any
"such theory, but entirely on the ground of want of
"jurisdiction in the prior case over the subject matter
"and over the person of the petitioner, in respect of in-
"quiry into which the jurisdiction of the Circuit Court
"was sought. If, in the opinion of that Court, the re-
"straining order had been absolutely void, or the peti-
"tioner were not bound by it, he would have been dis-
"charged, not because he would otherwise be deprived
"of due process, but because of the invalidity of the
"proceedings for want of jurisdiction. The opinion
"of the Circuit Court was that jurisdiction in the prior
"suit and proceedings existed, and the discharge was
"refused, but an appeal from that judgment directly to
"this Court would not therefore lie on the ground that
"the application of the Constitution was involved as a
"consequence of an alleged erroneous determination of
"the questions actually put in issue by the petitioner."

In Carey v. Houston Ry. Co., 150 U. S. 170, this Court said:

"The bill before us refers to no provisions of the
"Constitution upon which complainants relied to invoke
"the action of the Court in vindication of their sup-
"posed rights, or which was presented to be construed
"or applied by the Court. No question upon such con-
"struction or application was raised between the parties
"upon the record, or determined by the decree of the
"Circuit Court.

"It is argued that the record shows that complainants
"had been deprived of their property without due pro-
"cess of law by means of the decree attacked, but be-
"cause the bill alleged irregularities, errors and juris-
"dictional defects in the foreclosure proceedings, and

"fraud in respect thereof, and in subsequent transac-
"tions, it might have enabled the railroad company
"upon a direct appeal to have avoided the decree of
"sale, or which, if sustained on this bill, might have jus-
"tified the Circuit Court in setting aside that decree, it
"does not follow that the construction or application of
"the Constitution of the United States was involved
"in the case in the sense of the statute. In passing upon
"the validity of that decree, the Circuit Court decided
"no question of the construction or application of the
"Constitution, and, as we have said, no such question
"was raised for its consideration. Our conclusion is
"that the motion to dismiss the appeal must be sus-
"tained."

See to same effect Cosmopolitan Min. Co. v. Walsh, 193 U. S. 460.

II.

NO FEDERAL QUESTION WAS DECIDED BY EITHER THE CIRCUIT COURT OR COURT OF APPEALS. BOTH COURTS ASSUMED THAT THE JURISDICTION RESTED ENTIRELY UPON DIVERSE CITIZENSHIP.

While of course this Court would not be bound by the construction by the inferior courts of this complaint, yet it is important to notice that the Circuit Court never attempted to decide any constitutional question, if any such was involved. The opinion of the Circuit Court was that Hanley never had any title to the one-third interest because the statute of Idaho relating to probate sales had not been complied with when the pretended sale was made to him by the administrator.

The Court of Appeals likewise did not attempt to decide any such constitutional question. It held that

Hanley was not entitled to any assistance from a court of equity as to this one-third interest, because he had concealed certain facts from the representative of the Chemung Company at the time of the transaction in the Probate Court.

Moreover, the Circuit Court of Appeals was asked to allow an appeal to this Court from its decree, which application was denied on February 10, 1905. (See Record.) That Court ruled that this case was not one which could be taken to the Supreme Court. In other words, it held that jurisdiction of the Circuit Court depended entirely upon diversity of citizenship.

Will this Court review a case upon the theory that a constitutional question was raised in the complaint, when it was never a factor in the decisions of the trial court and could not be even considered by the Supreme Court in passing upon the merits of the case?

III.

BOTH APPELLEE AND APPELLANTS HAVE ALWAYS MAINTAINED THAT THE JURISDICTION OF THE CIRCUIT COURT DEPENDED ENTIRELY UPON DIVERSITY OF CITIZENSHIP.

The complainant in his bill did not refer to the Constitution of the United States and did not rely upon it. He claimed no immunity or privileges under it, nor did he ask the application or the protection of the Constitution of the United States or the construction of the same.

Cornell v. Green, 163 U. S. 75.

Carey v. Houston Ry. Co., 150 U. S. 170.
Ex Parte Lennon, 150 U. S. 393.

The appellants herein have heretofore made two applications to this Court in this case for a writ of certiorari. (183 U. S. 700; 193 U. S. 671.) In doing so they have expressly and impliedly represented to this Court that the jurisdiction of the Circuit Court depended entirely upon diversity of citizenship. In the first petition, page 50 (October term, 1901, Record No. 494), the petitioners stated:

"And your petitioners have no right of appeal or writ "of error in this case for the reason that jurisdiction of "the same was originally assumed by the United States "Court because of the diversity of the citizenship of the parties, plaintiff and defendant."

IV.

THE CLAIM TO THE ONE-THIRD INTEREST, CONCERNING WHICH THE APPELLANTS ASSERT THAT A CONSTITUTIONAL QUESTION WAS ALLEGED, WAS ABANDONED BY HANLEY IN MAY, 1901.

It should be kept in mind that the only interest which was awarded to Hanley by the lower courts was the one-eighth interest in the Skookum. Appellants here do not pretend that the allegations of the complaint with reference to that interest raised a constitutional question. They now pretend that the allegations as to the one-third interest only raise such a question. But that interest was awarded to appellants by the Circuit Court of Appeals in May, 1901, and thereafter Hanley

abandoned his fight as to that interest, and has never made any claim to it since. It then ceased to be a part of the case. The decree as to that interest was final at that time. The time has elapsed within which an appeal could be taken from the decree as to that interest.

Hill v. Chicago & Evanston R. Co., 140 U. S. 52.

Scriven v. North, 134 U. S. 366.

Even though the allegations as to the one-third interest were sufficient, independent of diversity of citizenship, to support the jurisdiction of the Circuit Court over that cause of action, they were not sufficient to support jurisdiction over the cause of action involving the one-eighth interest which would be the only subject of controversy in this Court if the appeal should be heard on the merits.

V.

IF SUFFICIENT ALLEGATIONS OF THE CONSTITUTIONAL QUESTION WITH REFERENCE TO THE ONE-THIRD INTEREST WERE MADE IN THE COMPLAINT, THE APPELLANTS HERE DO NOT BEAR SUCH A RELATION TO THE QUESTION AS TO ENTITLE THEM TO APPEAL TO THIS COURT.

"The decree did not injure defendant but sustained "its contention, and defendant is in no position to com- "plain that it is aggrieved by its own success."

New Orleans v. Emsheimer, 181 U. S. 153.

It will be observed that the only theory upon which the appellants claim that this appeal should be sustained

is that the allegations with reference to the third interest raised a constitutional question, and that while Hanley was denied any relief as to that interest, and has ceased to claim it, the Supreme Court has jurisdiction to determine questions raised by defendant as to the eighth interest which Hanley did recover, but concerning which no constitutional question was suggested. In other words, they seek to use as a lever a contention with reference to an interest which is no longer in controversy, to raise into this Court a controversy with reference to an interest concerning which no federal question was suggested. As to this latter interest, no pretense is made that a constitutional or other federal question is involved. The only questions involved as to this interest are questions of general law and of no public importance.

In Anglo-American P. Co. v. Davis P. Co., 191 U. S. 376, the appellants claimed that the jurisdiction of the Circuit Court was involved, and also that a constitutional question was raised by the allegations of the complaint. They, therefore, sought to sustain a direct appeal from the Circuit Court. After disposing of the first contention against the appellants, this Court said:

"With regard to the latter ground, the decision of "the Circuit Court again was in favor of the plaintiff, "and it has nothing of which to complain, 'As a general "rule a court will not allow a party to rely on anything "as a cause for reversing a judgment which was for his "advantage.' . . . This remark, to be sure, is not "strictly in point, as the plaintiff would not ask to have "the judgment reversed on the ground that this New "York law was constitutional, but it, with the quotation "from U. S. v. Jahn, helps to indicate a principle to be

"applied to the construction of the words 'in any case in "which the statute or law of a state is claimed to be in "contravention of the Constitution of the United States. "Those words are general in form, but they do not mean "that whenever a party makes a case of that sort he "may appeal directly to this Court whenever the de- "cision is against him, no matter on what grounds, al- "though his contention about the state law is sustained. "If a party comes into the Circuit Court alleging that "a state law is unconstitutional, and the Circuit Court "decides for him on that point, *the mere fact that there "was such a question in the case does not authorize him "to appeal to this Court on grounds that otherwise "would not support an appeal.* . . . The present "case illustrates the principle. The argument for the "appellant is devoted not to any constitutional or juris- "dictional point, but to an attempt to upset the decision "of the Circuit Court upon the question mainly of fact "as to the good faith, etc., of Weed in taking the as- "signment of the judgment. The provisions of Section "5 of the Act of 1891 were not intended to be made an "instrument for such attempts."

See *New Orleans v. Emsheimer,* 181 U. S. 153, to same effect.

In Lampasas v. Bell, 180 U. S. 270, this Court said:

"It follows, necessarily, that the plaintiff in error "has no legal interest in the constitutional question "which it raised, and upon which it claims the right to "come directly to this Court from the Circuit Court un- "der Section 5 of the Act of 1891, *supra.* To permit "it to come here directly from the Circuit Court would "make a precedent which would lead to the destruction "of the statute. We repeat, that questions which can "be raised under any of the subdivisions of Section 5 "of the Act must be real, the controversies they present "must be substantial, not only from the nature of the

"principles invoked, *but from the relation of the par-*
"ties to them by whom they are invoked."

The language of the cases from which the quotations are taken apply with equal force to Section 6 of the Act. The purpose of the legislation was to lessen the burden of this Court and to prevent delay.

VI.

THIS APPEAL WAS TAKEN MERELY FOR DELAY.

The record shows that this case was begun in the United States Circuit Court on March 19, 1899, to redress a fraud as to the one-eighth interest which was committed in April, 1898. Although Hanley has been vigorous in his assertion of his rights (126 Fed. 103), the defendants have, by frequent appeals, been able to retain the benefits resulting from their fraudulent conduct. This case has been in the United States Circuit Court of Appeals for the Ninth Circuit five times on appeal; three petitions for rehearing have been filed in that Court; one application for a writ of mandamus was heard; two applications to this Court for a writ of certiorari have been presented by appellants; and now they seek to longer delay this case by appeal to this Court upon representations directly opposite to those made by them in their application for certiorari.

The complaint clearly shows that the jurisdiction was originally invoked solely upon the ground of diverse citizenship. No constitutional question is pretended to be involved as to the property now in controversy, and the allegations which are claimed by appellants to

amount to a federal question were made by Hanley and related to an interest which it was decided he could not recover, and which he abandoned nearly four years ago. Appellants have twice represented to this Court in applications for certiorari that the jurisdiction depended upon diverse citizenship, and that they had no right of appeal. Will this Court delay this litigation to allow appellant to take a directly opposite position from that which has been heretofore taken?

We respectfully submit that this appeal should be promptly dismissed and an end be put to this exhausting litigation.

M. A. Folsom

Counsel for Appellee.